U.S. Department of Labor

Board of Alien Labor Certification Appeals
1111 20th Street, N.W.
Washington, D.C. 20036

DATE: NOV 3 1988
CASE NO. 88-INA-97

IN THE MATTER OF

WEIDNER'S CORPORATION
Employer

on behalf of

TJIN SAM ONG
Alien

BEFORE: Litt, Chief Judge; Vittone, Deputy Chief Judge; and Brenner, DeGregorio, Guill, Schoenfeld, and Tureck Administrative Law Judges

Nicodemo DeGregorio
Administrative Law Judge

DECISION AND ORDER

The above-named Employer requests review pursuant to 20 C.F.R. [656.26 of the United States Department of Labor Certifying Officer's denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to Section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(14) ("the Act").

Under Section 212(a)(14) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

This review of the denial of labor certification is based on the record upon which the denial was made, together with the request for review, as contained in an Appeal File ("AF"), and any written arguments of the parties. 20 C.F.R. [656.27(c).

Statement of the Case

Weidner's Corporation (Employer) is located in Monterey Park, California, and specializes in nutrition and health foods. In May of 1986 it filed an Application for Alien Employment Certification on behalf of Tjin Sam Ong (Alien). Employer desires to employ Alien as a salesman, whose duties would be to contact prospective buyers to persuade them to purchase nutrition and health foods, and to explain to them the nutritional value of the products. The requirements for the job include one year of experience in the job offered or as an assistant salesman, and knowledge of the Indonesian language (AF 49-50).

On March 27, 1987 the Certifying Officer issued a Notice of Findings, challenging the language requirement as too restrictive (AF 45-47). On June 1, 1987 Employer submitted a rebuttal (AF 6-42). On July 15, 1987 certification was denied on the ground that Employer had failed to prove that its language requirement arises from business necessity, as required by 20 C.F.R. 656.21(b)(2). This appeal followed. On February 8, 1988 the Associate Solicitor of Labor for Employment and Training Legal Services filed a brief in support of the denial of certification, which has been duly considered.

Discussion

Since in its rebuttal of June 1, 1987 Employer discusses at length its export business with Indonesian companies, as well as the necessity of the Indonesian language in establishing and maintaining new business relations, it is important to have in view a proper notion of the job opportunity involved in this case. According to the Application for Alien Employment Certification, Employer seeks a salesman to work in Monterey Park, California under the immediate supervision of a store manager (AF 49). In response to the Local Office's request for clarification, Employer advised that the salesman would work, not as a door-to-door salesperson, but in a retail store (AF 65, 63). Employer also submitted copies of letters over Alien's signature, which advertised Employer's products to, and solicited business from, persons in Indonesia (AF 67-83). Employer further asserted that it was "absolutely necessary for a person to speak Indonesian to communicate and correspond with persons of Indonesian descent who live in the San Gabriel Valley who are recent immigrant and new arrived non-immigrant who have no knowledge of the English language" (AF 62).

We understand Employer to want a person to work in a retail store in California to sell its products to customers in California. Hence, the original attempt to justify the need for the language with reference to immigrants in California. Although Alien may have used his knowledge of Indonesian language to write letters to potential customers in Indonesia, this is not part of the work a salesman does in a retail store. Thus Employer's arguments regarding the use of the Indonesian language in exporting its products to Indonesia lack relevance. And we agree with the Certifying Officer that Employer has failed to prove that its California customers of

Indonesian descent are so completely ignorant of the English language that they are unable to appreciate and purchase their food.

Even if some potential customers are unable to speak or understand English, so that some potential sales are lost as a consequence, it still would not follow that fluency in Indonesian is necessary to do the work of a salesperson in California, because there are other potential customers accessible. Were it otherwise, shops located in cities visited by large numbers of foreign tourists, to give an example, could bring their sales personnel from abroad through the labor certification process, an implication which we find incongruous.

ORDER

The Certifying Officer's determination denying labor certification is affirmed.

NICODEMO DeGREGORIO
Administrative Law Judge

NF/tjp

Jeffrey Tureck, Administrative Law Judge, concurring:

I concur in the result reached by the majority, since the Employer clearly failed to establish the business necessity of the Indonesian language requirement. However, I do not necessarily endorse the last paragraph of the majority's decision, which in any event is dicta.

JEFFREY TURECK
Administrative Law Judge